No. 18,838

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIMONEIRA COMPANY, ROGER DONLON, PAUL B. KERSTEN, and E. B. ANTONELL, et al.,

Appellants,

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, and ROBERT C. GOODWIN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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TABLE OF AUTHORITIES

Page

Cases:

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JURISDICTIONAL STATEMENT

This action was brought in the United States District Court for the Southern District of California, for the purpose of challenging certain administrative determinations made by the defendants under an act authorizing the importation of Mexican agricultural workers (65 Stat. 119, as amended, 7 U.S.C. 1461, hereinafter called "the Act" or "Public Law 78"). Plaintiffs sought an injunction restraining defendants from proceeding pursuant to these determinations and a declaration that the determinations are beyond defendants' statutory authority under Section 503(2) of the Act (R. 9). In the alternative, plaintiffs sought a judgment declaring that, if such deter-

minations are authorized by Section 503(2), then such Section is unconstitutional as an unlawful delegation of legislative power (R. 9).

This appeal is taken from a judgment entered June 10, 1963, granting summary judgment to defendants.

The jurisdiction of the district court was asserted on the basis of 28 U.S.C. 1331, 1332 and 1337.[1] The jurisdiction of this Court is based on 28 U.S.C. 1291.

STATEMENT OF THE CASE

1. Introduction. Public Law 78 authorizes, under certain conditions, the recruitment and importation into the United States of Mexican agricultural workers (commonly known as "braceros").[2] Section 503 provides that none of these imported workers shall be available for employment in any area unless the Secretary of Labor has determined and certified that, among other things,

> the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed

Article 10 of the Migrant Labor Agreement of 1951, as amended -- an agreement negotiated with the Republic of Mexico pursuant to the provision in the Act (Section 501)

1 / We dispute (see infra pp. 7-25) the existence of a justiciable case or controversy. Thus, we dispute the existence of any jurisdiction in the court below.

2 / Public Law 78 expires December 31, 1963. See 75 Stat. 761, amending 7 U.S.C. 1470. A bill providing for a one-year extension, with no other amendments, passed the House of Representatives October 31, 1963. 109 Cong. Rec. 19685 (daily ed.). The Senate passed a bill providing for a one-year extension and another amendment, requiring that domestic workers be offered insurance coverage, housing, transportation and a work period guarantee comparable to those offered the Mexican workers. 109 Cong. Rec. 14404 (August 15, 1963, daily ed.). The matter is now in conference. This case will, of course, be moot if no extension is passed. It is not believed that the Senate amendment would affect this case.

that the importation of workers be "pursuant to arrangements between the United States and the Republic of Mexico"--provides that only employers obtaining the required certification may employ Mexican workers under the Act. Articles 9(a) and 15(a) of the Migrant Labor Agreement require the employer to pay the wage rate determined by the Secretary of Labor to be necessary in order to permit him to certify that employment of Mexican workers will not adversely affect domestic wages and working conditions.

Two determinations are challenged by this action. The first is set forth in a letter, dated March 29, 1962, from defendant Goodwin, who is the Administrator of the Bureau of Employment Security of the United States Department of Labor, to all state employment security agencies (R. 11). The second is set forth in a memorandum dated October 19, 1962, from defendant Goodwin to certain Regional Administrators of the Bureau of Employment Security (R. 13). Both determinations announced that defendants would be unable to certify that employment of Mexican agricultural workers in the States specified in the determinations will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed unless the Mexican workers are paid certain specified hourly wage rates or equivalent piece rates. It was further announced that employers could not be authorized to employ such workers under the Act unless they paid such workers the specified rates.

2. The Complaint. Appellants herein (plaintiffs below) allege that they are users of Mexican workers under the Act and that this action is brought for themselves and on behalf of all users of Mexican agricultural workers (R. 3). It is alleged that plaintiffs "are partially or wholly dependent" on the use of Mexican labor imported under the Act in the production and harvesting of their crops (R. 4). It is further alleged that defendants' action in making the challenged determinations "has deprived the Plaintiffs of their right to negotiate a wage and to determine the manner of payment, whether an hourly rate or piece rate, with Mexican National agricultural workers, in accordance with the provisions of [Section 501(5)] of the Act." (R. 7). Section 501 (5) of the Act provides that the Secretary of Labor is authorized:

> (5) to assist such workers and employers in negotiating contracts for agricultural employment (such workers being free to accept or decline agricultural employment with any eligible employer and to choose the type of agricultural employment they desire, and eligible employers being free to offer agricultural employment to any workers of their choice not under contract to other employers).

No allegation is made as to whether plaintiffs are in fact paying wages below the rates specified in the challenged determinations, whether defendants have at any time threatened to withdraw plaintiffs' authorization to employ Mexican workers under the Act on the ground that their wages have been below those specified in the determinations, whether plaintiffs were paying such workers at rates below those specified in the determinations before they were issued, or whether plaintiffs would pay rates below those specified in the determinations if they are revoked or declared null and void.

It is, however, alleged generally that each of the plaintiffs "is adversely affected by the actions of the Defendants in making . . . promulgating, maintaining and enforcing" the challenged determinations, and that each of the plaintiffs "will suffer as a result of said wrongful action irreparable damage in an amount in excess of Ten Thousand Dollars ($10,000), exclusive of interest and costs." (R. 8).

The first challenged determination stated that an adverse-effect certification would not be made for Mexican workers employed at hourly wage rates lower that $1.00 an hour in California (R. 11). This determination is dated March 29, 1962, and took effect immediately. Exhibit D to defendants' motion for summary judgment (R. 130) is a table prepared by the California Department of Employment from the California Weekly Farm Labor Report. This table compares "commonly reported hourly wages" by county for the year prior to March 29, 1962, and the year after March 29, 1962. For Ventura County, in which the plaintiffs Limoneira Company and Roger

Donlon are alleged to be engaged in the business of raising citrus fruit and miscellaneous vegetable crops (R. 2), the table states that the commonly reported hourly wage in both years was $1.00 an hour. For Kern County, in which plaintiff E. B. Antonell is alleged to be engaged in the business of raising miscellaneous vegetable crops (R. 3), the table states that the commonly reported hourly wage in both years was $1.00 an hour. For Riverside County, in which plaintiff Paul B. Kersten is alleged to be engaged in the business of raising miscellaneous row crops (R. 2-3), the table stated that the commonly reported wage was the same in both years -- $1.00 an hour -- for the western part of the county, but that in the eastern part it was $.85 an hour for the year prior to March 29, 1962, and $1.00 an hour for the year after.[3/]

The second challenged determination (R. 13) stated that an adverse-effect determination would not be made for lettuce ground harvest unless the Mexican workers were paid the higher of a specified piece rate or the "adverse effect" wage rate for the state in question -- which was $1.00 an hour in the case of California. This determination was dated and took effect on October 19, 1962. Exhibit E to defendants' motion for summary judgment is a collection of tables, entitled "Piece Rate Earnings of Mexican Nationals Employed in California, January 1 through

3/ The record is not clear whether Mr.Kersten's farm is located in the eastern or western portion of Riverside County. The record does show, however, that Mr. Kersten employs no more than 90 braceros (R. 155).

December 31, 1962," prepared by the Bureau of Employment Security of the Department of Labor. Table VI (R. 146) states the average wage per hour by county and crop. In Ventura County, the average for lettuce harvest was $1.23 an hour. No figure is given for lettuce harvest in Kern County. For Riverside County (East) for figure given is $1.36 an hour; no figure is given for lettuce harvest in Riverside County (West).

3. Background of the Challenged Determinations.

The administrative experience under the Act which led to issuance of the determinations here challenged was recounted by Secretary (now Justice) Goldberg in testimony given on June 13, 1961, at hearings held by the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry, 87th Cong., 1st Sess. (the printed transcript of these hearings is hereinafter referred to as the "Hearings"). The Subcommittee was considering a number of bills in connection with the proposed extension of the Mexican farm labor program to December 31, 1963, and Secretary Goldberg was explaining the Administration's position.[4/]

Secretary Goldberg explained that "tremendous difficulty" was encountered in administering the "adverse effect" provision and the provision of Section 503(3) that no workers be available for employment under the Act unless the Secretary has determined

4/ The major portion of Secretary Goldberg's testimony was in the form of a prepared statement, which is reprinted at 107 Cong. Rec. 18783-18787 (September 8, 1961).

and certified that

> reasonable efforts have been made to attract domestic workers for such employment at wages, standard hours of work, and working conditions comparable to those offered to foreign workers.

(Emphasis added.) As Secretary Goldberg pointed out, the intent of these two provisions was that the available domestic labor should be hired at a rate unaffected by the importation of Mexican workers, and that Mexican workers could then be hired when necessary to supplement the domestic labor force. Hearings, pp. 229-30. 5/

As appellants point out, the practice followed in the first few years of administering Section 503 was to certify that no adverse effect would occur if the imported foreign workers were paid the prevailing wage rate offered domestic workers for similar work in the area into which the braceros were imported. This was believed at the time to be sufficient to satisfy the intent of the program as one of supplying foreign workers to supplement, rather than to replace, the domestic labor force. In any area in which the foreign workers were merely supplementary, the idea was that the prevailing wage rate would be set by the supply and demand for domestic labor, and employment of supplemental foreign labor would not adversely affect the wages of domestic labor. Hearings, pp. 229-30.

However, as years of experience in administering the Act accumulated, the Labor Department found that in many areas Mexican workers were replacing domestic labor and either

5/ See Senate Report 214, 82d Cong. 1st Sess., U.S. Code Congressional and Administrative News, p. 1569: "your committee belives that provision should be made at this time for supplying the foreign agricultural labor found necessary to supplement the domestic labor force" (Id. at 1572).

driving down the prevailing rate for the area or preventing it from rising in accordance with the general nationwide rise in agricultural wage rates. Hearings, pp. 165,230.

For example, as Secretary Goldberg explained, 123 wage surveys made in 1960 in areas employing braceros revealed that in 67 per cent of the cases the wage paid domestic workers was the same as in the previous year despite generally rising farm wages, while in 15 per cent of the cases the wage paid domestic workers had actually declined. It was also found that in Arkansas, Missouri, Texas, and New Mexico the wage rate normally paid Mexican workers in 1960 -- 50 cents per hour -- was the same rate paid in 1951, when the Act first went into effect.[6/] Since growers were required to pay Mexican workers the prevailing rate offered domestic workers, and since domestic workers had only to be offered the rate paid the Mexicans, it is apparent that any domestic agricultural workers left in these states were also failing to participate in the general rise in agricultural wage rates. Hearings, pp. 165, 230.

An attempt was made to remedy this situation, which was felt to be a subversion of the congressional intent, expressed in Section 503(2), to prevent the Mexican labor program from adversely affecting wages of domestic agricultural workers. After a few isolated earlier efforts, in 1958 the Secretary adopted a policy that piece work rates should produce not less than 50 cents an hour for reasonably diligent workers. This

6/ The results of these and other similar surveys are summarized at 107 Cong. Rec. 7727 (May 10, 1961).

resulted in the so-called 90/10 formula: 90 per cent of the workers must make each week at least 50 cents an hour, provided that, if more than 10 per cent of the workers average less than 50 cents an hour, the employer might prove that such workers were incompetent. Hearings, p. 231. Initially an attempt was made to obtain compliance with this policy on a largely voluntary basis, but with little success. Hearings, p. 165. Then on May 17, 1960, the Secretary announced a determination that he could not certify that employment of Mexican workers at a wage of less that $2.50 per cwt. for picking cotton, or such higher rate as necessary to achieve a rate of 50 cents an hour in accordance with the 90/10 policy, would not adversely affect the wages and working conditions of domestic workers similarly employed. The Department conceded that this determination was not based upon the prevailing domestic wage rate for the areas involved.

This determination was promptly challenged in the courts. Johnson v. Kirkland, 290 F. 2d 440 (C.A. 5), certiorari denied 368 U.S. 889; and Rio Hondo Harvesting Ass'n v. Johnson, 290 F. 2d 471 (C.A. 5). Decisions favorable to the Secretary were obtained in the spring and summer of 1961. During the period of over a year in which the cases were being litigated, the Secretary was enjoined from putting the determination into effect, and the Mexican workers in the areas involved generally received less than 50 cents an hour. Hearings, p. 231. The decisions in favor of the Secretary were based wholly on procedural grounds

and thus did not settle the substance of the legal dispute.

Faced with frustrating and inconclusive litigation and with continuing attacks in both Congress [7] and the courts [8] on his authority under Section 503, in 1961 the Secretary sought legislation. The Secretary made it clear that he believed the administrative actions which had resulted in the Johnson and Rio Hondo cases were authorized by Section 503(2) in its present form, but that additonal legislation was desirable to avoid further litigation. Hearings, p. 165-66. The bills supported by the Admisistration -- S. 1945 and H.R. 6032, 87th Cong., 1st Sess. -- specified that employers using Mexican workers would be required to offer them the statewide or national average rate for hourly paid farm labor, whichever is less, with the proviso that no employer would be required to increase his rate by more than 10 cents an hour in any year. The proposal was approved by the Senate (107 Cong. Rec. 18902 (September 11, 1961)), rejected by the House (107 Cong. Rec. 7726 (May 10, 1961)), and finally rejected in conference (107 Cong. Rec. 19796 (September 16, 1961)). [9]

7/ See legislative history quoted in Appellants' Brief at pp. 48-53.

8/ Dona Ana County Farm & Livestock Bureau v. Goldberg, 200 F. Supp. 210 (D.D.C.).

9/ The bill which was approved by the Senate and went to conference was an amendment offered from the floor by Sen. McCarthy, requiring that the Mexican workers be paid at least 90 percent of the national or state average, whichever is less. No provision limiting the required annual raise to 10 cents an hour was included. 107 Cong. Rec. 18770 (September 8, 1961). The bill initially rejected by the House was H.R. 6032, which provided as stated in the text.

The legislative history does not reveal any single reason for the rejection. Some Senators and Congressmen thought that the Secretary should not be given authority to set minimum wages in the manner specified. See 107 Cong. Rec. 7707 (May 10, 1961) (Rep. Sisk); 107 Cong. Rec. 18901 (September 11, 1961) (Sen. Cooper). Others thought the present law gave the Secretary sufficient power to prevent adverse effect. 107 Cong. Rec. 7726 (May 10, 1961) (Rep. Teague); 107 Cong. Rec. 7714 (May 10, 1961) (Rep. Cooley). Others interpreted the proposed bill as requiring or having the effect of an annual wage escalation each year and objected to the provision on this ground. See 107 Cong. Rec. 7727 (May 10, 1961) (Rep. Gathings); 107 Cong. Rec. 18803 (September 8, 1961) (Sen. Jordan). Secretary Goldberg himself reported to the Senate Subcommittee that opposition had arisen on the ground that the bill was not needed because the authority for establishing the wage formula specified in the Administration bill existed under the present statute. Hearings, p. 230.

Secretary Goldberg made it quite plain to the Senate Subcommittee that he believed he had the authority under Section 503(2) to establish a minimum wage along the lines of the formula specified in the Administration bill, and that additional legislation was being sought for the purpose of clarification of standards and avoidance of litigation, rather than for the purpose of conferring authority which did not otherwise exist. Hearings, pp. 165-66. This view was reiterated by Senator Mansfield on the floor of the Senate, 107 Cong. Rec. 18899

(September 11, 1961). The Department's view of its authority under Section 503(2) was also well known to the House. See legislative history quoted in App. Br. 48-52. And yet, despite extensive consideration of the whole Mexican labor program by both Houses of Congress -- including consideration of several amendments made in committee and offered from the floor[10/] -- no one proposed a bill specifically to deny the Secretary the authority over wages which he claimed to possess under Section 503(2), although such a bill had been proposed at the previous session and had failed to get to the floor of the House, according to its sponsor, only because of lack of time (App. Br. 50). The reason for this failure may well have been the attitude of the Senate; in view of its vote in favor of the Administration-backed bill, the Senate could hardly have been expected to approve a bill denying the Secretary the authority he claimed to possess.

In any event, this legislative impasse left the Secretary in the position he had been in before proposing new legislation. In his statement upon signing the bill extending the program to December 31, 1963, the President expressed his dissatisfaction with the failure of Congress to include the Administration-backed amendments and noted that the program as then administered was adversely affecting wages and working conditions of domestic agricultural workers. Referring to the "comprehensive, general

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10/ Five days of hearings were held by the Subcommittee on Equipment, Supplies and Manpower of the House Committee on Agriculture, from March 6-17, 1961. Two days of hearings were held by the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry, on June 12 and 13, 1961. House debates are reported at 107 Cong. Rec. 7706-28 (May 10, 1961), 7869-72 (May 11, 1961). Senate debates are reported at 107 Cong. Rec. 18767-92 (September 8, 1961), 18803-6 (September 8, 1961), 18899-906 (September 11, 1961).

authority" of the Secretary under Section 503(2), the President went on to say:

> I sign this bill with the assurance that the Secretary of Labor will, by every means at his disposal, use the authority vested in him under the law to prescribe the standards and to make the determinations essential for the protection of the wages and working conditions of domestic agricultural workers. 11/

The Secretary proceeded to obtain the agreement of the Mexican Government to an appropriate amendment to the Migrant Labor Agreement of 1951 (App. Br. 5, 18-22). The determinations challenged in this action were then proposed and, after public hearings, were made and issued.

4. Proceedings Below. On defendants' motion for summary judgment, the district court held that (1) the challenged determinations were within the Secretary's authority under Section 503, and (2) there was no substantial question warranting a three-judge court as to the constitutionality of Section 503 (plaintiffs having requested a three-judge court under 28 U.S.C. 2282 to rule on the question of constitutionality in the event that the determinations were held to be authorized by Section 503 (R. 51)).

As to the question of statutory authority, the district court, after reviewing the authorities, had this to say (R. 186):

> It is extremely difficult to follow the plaintiffs' argument that unless the "braceros" are paid the prevailing wage their employment will adversely affect the domesti workers, but the Secretary cannot say that unless a certain wage, which is concededly reasonable, is paid the "braceros the domestic worker would be adversely affected.

11/ Public Papers of the Presidents, John F. Kennedy, 1961, at pp. 639-40.

> True, the latter basis might have the indirect effect of fixing wages for domestic workers in areas where "braceros" are employed, but certainly the employment or threatened employment of "braceros" might well cause a depressant effect upon prevailing wages and, thus, an "adverse affect." The "adverse affect" is what the statute is designed to prevent, and the fixing of a minimum wage rate would appear to be a much more effective means of preventing an "adverse affect" than using the prevailing wage rate as a criteria.

As to the question of constitutionality, the district court reasoned as follows (R. 180):

> Plaintiffs conceded in their argument that if the Secretary confined his findings of "adverse affect" based upon prevailing wages rather than upon minimum wages, there could be no claim of unconstitutionality. Inasmuch as it is found that there are no grounds for distinction, there can likewise be no claim of unconstitutionality.

STATUTE INVOLVED

Public Law 78, as amended, is set forth at pp. 7-13 of Appellants' Brief.

SUMMARY OF ARGUMENT

I. This case has not ripened into a justiciable case or controversy in which the statutory and constitutional questions urged by plaintiffs may be adjudicated, for the following reasons: (1) plaintiffs have not shown that they will or are likely to pay wages below the level specified in the Secretary's determinations, (2) there has been no threat to enforce the policy expressed in the

determinations against plaintiffs by withdrawing their authorizations to employ braceros, or by refusing to issue authorizations in the first instance, or by any other means, and (3) aside from general allegations of damage, which are rebutted by such facts as have been put before the court below, there has been no allegation or showing that the mere existence of the Secretary's determinations has damaged plaintiffs by causing them to pay wages higher than what they would otherwise pay.

II. The command of Section 503(2) of the Act, that employment of braceros shall not adversely affect the wages of domestic workers, is a fundamental part of congressional purpose in establishing the Mexican labor program. Thus, when the Secretary found that employment of braceros was adversely affecting the prevailing wage paid domestic workers, it was his duty under Section 503(2) to condition his adverse effect certifications on payment of another wage level which would not have a depressant effect on the prevailing domestic wage. The two determinations here challenged are an attempt to carry out this duty -- an attempt which was not only authorized by the Act, but was indeed required in light of the effect the program was having on prevailing domestic wages.

III. Section 503(2) does not give the Secretary a roving license to set minimum wages at any level he may desire. On the contrary, it lays down a standard -- adverse effect on domestic wage rates -- which under

applicable precedent is sufficiently specific to sustain the delegation of wage-setting authority made by the Section.

ARGUMENT

I. This case has not ripened into a justiciable controversy within the jurisdiction of the district court.

While the Secretary is anxious to have a ruling on the merits of this case, we feel compelled to point out to this Court that, in its present posture, the case has not ripened into a justiciable "controversy" within the meaning of the Declaratory Judgments Act, 62 Stat. 964, as amended, 28 U.S.C. 2201, and Article III, Sec. 2 of the Constitution.

The reason for this is quite simple. Plaintiffs have not alleged that they are paying, have paid, or intend to pay wages below the levels set forth in the Secretary's determinations. Nor have they alleged that the Secretary has threatened to enforce the determinations by revoking their authorizations to employ Mexican workers under the Act. And finally, they have not alleged that compliance with the determinations, or the existence of the determinations, has in any way damaged their businesses by requiring them to pay wages above what they would otherwise pay. The general allegations that

plaintiffs are "adversely affected" and "will suffer . . . irreparable damage" (R. 8) are not sufficient to establish justiciability, especially in the face of statistics offered by defendants casting serious doubts on the existence of any substantial damage. And the allegation that plaintiffs have been deprived of some abstract "right to negotiate a wage" (R. 7) is insufficient without a more specific allegation as to some concrete interference with the supposed right.

As Mr. Justice Frankfurter has pointed out, "Justiciability is, of course, not a legal concept with a fixed content or susceptible of scientific verification." Poe v. Ullman, 367 U.S. 497, 508. Accordingly, the decisions which define and apply the concept may not always have been perfectly consistent. However, the Supreme Court decisons have all required that at least one of the following elements be present to establish justiciability: (1) plaintiff is about to engage in conduct running afoul of the statute or administrative action sought to be challenged, (2) such statute or action is about to be enforced against him, or (3) in certain extraordinary circumstances, the mere existence of such statute or action has caused him substantial damage. None of these elements is present here.

1. Perhaps the closest precedent on its facts to the instant case is Communist Party v. Control Board, 367

U.S. 1, in which a challenge to certain statutory provisions was held to be nonjusticiable because the Court doubted that the petitioner would ever engage in conduct running afoul of the challenged provisions. In that case petitioner challenged a statute requiring it to register and attaching certain disabilities to its operation after registration -- depriving it of a tax exemption, requiring that it label any mailed propaganda, denying passports to its members, making its members ineligible for federal employment, subjecting its alien members to deportation, and so on. Since the case arose as an appeal from an order requiring petitioner to register, there was no doubt that the Court was required to adjudicate questions pertaining to the provision requiring registration. However, the Court refused to adjudicate the challenge to the provisions imposing disabilities on registered organizations, on the ground that it did not know that petitioner, once registered, would ever engage in activities affected by the statutory disabilities. For example, the Court did not know that petitioner would have any taxable income, would mail any material required to be labeled, would have any member seeking a passport or a federal job, or a would have any alien member subject to deportation under the statute. 367 U.S. at 78-79.[12/] The Court found to be controlling a case in which it had refused to find

12/ Of the four dissenters, only one disagreed with the Court's conclusion on this point (367 U.S. at 144-45), while two explicitly agreed (367 U.S. at 191) and the fourth limited his discussion of the merits to the registration requirement (367 U.S. at 175).

justiciability on closely similar facts -- Electric Bond & Share Co. v. Securities and Exchange Comm'n, 303 U.S. 419, discussed in 367 U.S. at 73-77 (involving registration under the Public Utility Holding Company Act).

The instant case is governed by the Communist Party and Electric Bond & Share cases. As in those cases, we do not know that the plaintiffs here will ever engage in conduct which will bring into effect the sanction envisaged by the challenged determinations. Indeed, in view of the wage statistics attached to defendants' motion for summary judgment (see supra at pp. 5 - 7), there is affirmative reason to doubt that plaintiffs will ever engage in such conduct. Only in the western part of Riverside County were the wages for the year before the first challenged determination apparently lower than for the year after: 85 cents an hour before, as opposed to $1.00 an hour after (R. 130). Plaintiff Kersten resides at Indio, in the middle of the County (R. 2-3), and was authorized to employ 90 braceros (R. 155). The record does not show in what portion of Riverside County Mr. Kersten has his farm. Therefore, as far as this record shows, Mr. Kersten, along with all the other plaintiffs, has been employing braceros in an area where the prevailing wage has been $1.00 an hour all along. Moreover, neither Mr. Kersten nor any of the other plaintiffs has asserted that he intends in the future to pay wages below the level determined by the Secretary. The reason for this

lack of an essential allegation is, we believe, clear from the fact that the prevailing wage in their areas has been at that level all along.

The figures with respect to lettuce harvest are even more revelaing. The hourly average for the year in which the lettuce harvest determination went into effect was $1.23 in Ventura County (R. 146), and $1.36 in Riverside County (East) (R. 150). And yet the hourly minimum set by the challenged determination was $1.00. These figures at the very least raise a question as to whether the plaintiffs located in these counties can be expected to pay wages for lettuce harvest below the minimum specified in the determination.

2. The Communist Party and Electric Bond & Share cases may be said to represent the most liberal interpretation of the justiciability concept. For they might be read to imply that the issue of justiciability turns in part on whether the party seeking to invoke jurisdiction can show that it will engage in conduct violating the statutory or administrative provision sought to be challenged, and that a treat of immediate enforcement of the provision against the plaintiffs may not be necessary. In other cases the Supreme Court has refused to find justiciability despite the fact that the plaintiffs intended to and could be expected to engage in conduct violating the challenged provision, on the ground that there was no threat of immediate enforecment. United Public Workers v. Mitchell,

330 U. S. 75; Longshoremen's Union v. Boyd, 347 U.S. 222. Of course, no immediate threat of enforcement exists in the instant case. No one has threatened to withdraw plaintiffs' authorizations to employ braceros, or not to issue authorizations which plaintiffs may need, or to enforce the challenged determinations against plaintiffs in any other fashion. The reason, of course, is simple: plaintiffs have apparently not paid wages below the level set in the Secretary's determinations, nor even stated an intention to do so.

The Boyd case is especially noteworthy, since it concerned a complaint closely similar to the instant complaint: plaintiff sought a declaration accompanied by appropriate injunctive relief that an announced administrative determination was beyond the scope of the pertinent statute, and in the alternative requested a ruling by a three-judge court that, if such determination was within the statute, then the statute was unconstitutional. The Court found that there was no justiciable controversy, despite the fact that plaintiff's members not only wished to engage in conduct which would bring into effect the announced administrative sanctions, but had regularly engaged in such conduct in the past--neither of which factors is alleged to be present in the instant case.

3. The Boyd and Mitchell cases would require an immediate threat of actual enforcement before a statute or administrative determination may be challenged. The more recent case of Poe v. Ullman, 367 U.S. 497, appears

also to insist on that requirement.[13] Other cases have been somewhat more liberal, permitting the challenge in the absence of a threat of immediate enforcement where there are detailed allegations that the very existence of the challenged statute or regulation has caused the plaintiff substantial damage. E.g., Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, in which petitioner alleged that the challenged administrative regulations had caused the cancellation of several contracts which were vital to its operation. Accord: Pierce v. Society of Sisters, 268 U.S. 510; see Communist Party v. Control Board, 367 U.S. 1, 79-81 (citing cases). Cf. California Comm'n v. United States, 355 U.S. 534, in which it was clear that the challenged administrative determinative determinations would substantially impede plaintiff's operations.

In the instant case, all we have is a generalized allegation of damage, which is called into serious question by the wage statistics submitted by defendants. As has been shown, these statistics indicate that in all relevant areas, with the possible exception of Riverside County (East), wage rates for braceros have been generally unaffected by the Secretary's determinations. It may be that plaintiffs could have convinced the court below

13/ Cf. Evers v. Dwyer, 358 U.S. 202, involving a challenge by a Negro to a Tennessee statute requiring segregated seating on buses. Justiciability was predicated on the fact that plaintiff had violated the statute in the past and had been threatened with arrest by two police officers. Clearly, also, the mere existence of the statute damaged plaintiff in the sense that it prevented him from doing what he could and clearly would otherwise do. Both these elements of justiciability -- a threat of enforcement and damage -- are lacking in the instant case.

that defendants' statistics are invalid as applied to plaintiffs' operations. But plaintiffs neither brought forth nor alleged any facts which would so indicate. In these circumstances, general allegations of damage such as those made by plaintiffs clearly would not be sufficient to establish damage for the purpose of jurisdictional amount under 28 U.S.C. 1331 or 1332. KVOS, Inc. v. Associated Press, 299 U.S. 269; McNutt v. General Motors Acceptance Corp., 298 U.S. 178. It is difficult to see how such allegations can be held sufficient for purposes of the more fundamental requirement of justiciability.

Of course, the statutory right which plaintiffs claim to unfettered negotiation with their Mexican workers (R. 7) no more confers justiciability than did the supposed constitutional right of the federal employees in United Public Workers v. Mitchell, supra, to engage in the political activity forbidden by the Hatch Act. Plaintiffs have not alleged an actual or threatened interference with the claimed right, other than such interference as may flow from the mere existence of the administrative determinations they seek to upset. Neither have plaintiffs sufficiently alleged that the mere existence of such determinations has caused them any substantial damage. A justiciable case or controversy does not exist; the action should accordingly have been dismissed for lack of jurisdiction.[14/]

14/Although the district court did not decide the question of justicability, the issue of equitable jurisdiction of the court was raised below (R. 21-22). Of course, the question of justiciability, going to jurisdiction, may be raised any time. See Muskrat v. United States, 219 U.S. 346; Mitchell v. Maurer, 293 U.S. 237, 244.

II. The Secretary's determinations here challenged are attempts to carry out his statutory duty of insuring that employment of braceros does not adversely affect wages of domestic workers. This duty cannot be discharged merely by insuring that braceros are paid a prevailing wage which has been adversely affected by the very fact that braceros are available.

Subsections (1) and (2) of Section 503 are a fundamental part of Public Law 78. Under these subsections, braceros may not be employed unless the Secretary of Labor has certified that (1) sufficient domestic workers who are able, willing and qualified are not available,[15] and (2) employment of foreign workers "will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed."

The basic concept was that Mexican workers would be available only where there was a shortage of domestic workers. It was thought that the Mexican workers would be only a supplemental labor force. See Senate Report 214, 82d Cong. 1st Sess., U.S. Code Congressional and Administrative News, pp. 1569, 1572. Accordingly their use would not adversely affect domestic workers as long as available domestic workers were first offered the jobs at prevailing wages set without reference to the fact that Mexicans would become available if domestic workers did not accept the wages offered. Thus Senator Ellender, the proponent of the bill which became the original Act (S. 984, 82d Cong., 1st Sess.), referred to Section 503

15/ Under Subsection (3), domestic workers need only be offered the rate paid the braceros. Thus the Secretary's certification is as to availability of domestic workers at the wage rates offered braceros.

in defending the bill against the criticism of Senators Chavez and Lehman, who thought that it would depress the wages of domestic agricultural workers. 97 Cong. Rec. 4476-77 (Sen. Lehman), 4478-79 (Sen. Chavez), 4483-84 (Sen. Chavez) (April 27, 1951), 4513 (Sen. Chaez) (April 30, 1951). Senator Ellender quoted Section 503(1) and (2) in full and went on to say (97 Cong. Rec. 4513-14 (April 30, 1951)):

> Surely . . . if the administrator of this measure does his duty American farm workers will be protected.

Later, Section 503 was used to defend the Act in its present form as attempts were made to strengthen the protection of domestic workers. Congressmen who pointed to statistics showing depressed prevailing wages for domestic labor in areas where Mexican labor was prevalent were told that their remedy did not lie in legislative amendment. It was said that their complaint should be taken to the Secretary of Labor -- that if the Secretary performed his duty under Section 503 as presently written, the Mexican labor program would not depress domestic wages. 107 Cong. Rec. 7714 (May 10, 1961) (Rep. Cooley).

The determinations here challenged are an attempt by the Secretary to perform his duty under Section 503. As pointed out by appellants (App. Br. 4), it was thought during the first several years of the program that this duty could be adequately discharged by conditioning the certifications under Section 503 upon payment of domestic wages prevailing in the area in which the braceros were

to be employed.[16/] But, as administrative experience under the program accumulated, it became apparent that this was not sufficient to fulfill the congressional purpose. See Hearings, pp. 164-5, 229-30. Wage surveys taken in 1960 showed that, despite generally increasing agricultural wages, in 67 percent of the areas in which employment of braceros was prevalent, the prevailing wage had remained stationary, while in 15 percent of such areas the prevailing wage had actually gone down. Ibid. Wages paid braceros in Arkansas, Missouri, Texas and New Mexico had remained at 50 cents an hour in the years since 1951. Wages of domestic labor similarly employed in these areas a fortiori were the same, despite a general increase in domestic agricultural wages of 46 per cent in that period. Ibid.

16/ The 1955 amendment to Section 503 (see App. Br. 34), which authorizes provision for obtaining facts relevant to wages paid domestic farm workers, was intended to assist the Secretary in performing his duty under Section 503(2) in the manner that was then thought would adequately carry out the basic purpose of the Section. The 1955 amendment can hardly be read to provide that the "prevailing wage" standard is the only permissible condition to "adverse effect" determinations under Section 503(2), especially when it has become clear in the light of subsequently developed facts that this standard, standing alone, is inadequate to fulfill the congressional purpose to protect domestic wages. Payment of prevailing domestic wages has remained one condition for certification under Section 503 (2). See Article 15(a), Migrant Labor Agreement of 1951, as amended. Thus the Secretary is still performing his responsibilities under the 1955 amendment to Section 503.

In the face of this evidence, the Secretary of Labor was compelled to act to prevent subversion of the congressional mandate that domestic wages not be adversely affected by employment of Mexicans. After initial attempts in 1959 to deal with the situation became bogged down in inconclusive litigation (Hearings, pp. 165, 231; see Johnson v. Kirkland, supra) the Secretary attempted to get legislative clarification of the authority, which he believed he already had, to condition his certifications under Section 503(2) upon payment of the statewide or nationwide average for agricultural labor, whichever is less.

Some members of Congress agreed with the Secretary that this authority already existed. See 107 Cong. Rec. 18899 (September 11, 1961) (Sen. Mansfield);[17] statement of Rep. Bailey quoted at App. Br. 52. Others disagreed. See App. Br. 48-55.[18] The Senate passed the Administration bill, 107 Cong. Rec. 18902 (September 11, 1961), but it

17/ Senator Mansfield said, among other things:

> This amendment, rather than conferring authority upon the Secretary of Labor in the area of agricultural wages, is a limitation upon the broad authority he presently has under Public Law 78. Under section 503 of that act he may now prescribe wage criteria, which he finds necessary, in the determination of whether the employment of Mexican nationals in an area will adversely affect the wages and working conditions of our agricultural workers similarly employed. He now has authority to prescribe the same test of adverse effect as is proposed by this amendment.
>
> * * * *
>
> If this amendment is not adopted, let there be no future criticism of the Secretary of Labor if he prescribes similar tests administratively. The Secretary of Labor has advised the Congress that he has found clear indications of adverse effect and will feel constrained in carrying out his statutory responsibilities to take steps beyond those already taken. (107 Cong. Rec. 18899 (September 11, 1961)).

18/ It should be noted that the principal thrust of the

failed in the House and in conference, 107 Cong. Rec. 7727 (May 10, 1961), 107 Cong. Rec. 19796 (September 16, 1961). But despite the Secretary's plainly announced view of his own authority under Section 503(2) as it then existed, Congress in the course of extensive consideration of the Mexican labor program also failed to consider or pass any bill denying the Secretary such authority -- although such a bill had been introduced during the previous session and, according to its sponsor, had failed of passage only because of lack of time remaining in that session (App. Br. 49-50).

Faced with congressional refusal to clarify the procedures to be followed in carrying out Section 503(2), the Secretary, at the direction of the President,[19] proceeded to meet his responsibilities under the Section as written by issuing the determinations here challenged.

Certifications under Section 503(2) were to be conditional

18/cont'd.
legislative history quoted at App. Br. 48-55 is directed at the Secretary's assertion of authority under the Wagner-Peyser Act, 48 Stat. 117, as amended, 29 U.S.C. 49. This Act authorizes the Secretary to set up a national system of employment offices. Under the Act, the Secretary had issued regulations conditioning the use of those offices to obtain agricultural workers upon payment of prevailing wages in the area of employment. 24 F.R. 9367 (November 20, 1959), 20 C.F.R. 602.9. The Wagner-Peyser Act has a nationwide effect and may be argued to have no specific provision which would tie the Secretary's minimum wage setting authority to an "adverse effect" standard. By contrast, the effect of the Secretary's determinations under Section 503(2) is limited to the 1.4 per cent of American farms which employ braceros. 107 Cong. Rec. 7720 (May 10, 1961) (reprinting Department of Labor figures for 1959). Thus the fact that the Secretary's efforts under Wagner-Peyser elicited congressional concern over unwise delegation of authority and possible conflict with the general exemption of agricultural labor under the Fair Labor Standards Act (see App. Br. 37-39) is not a true measure of what congressional reaction would be to the Secretary's present efforts under Section 503(2). It

upon payment of an hourly wage (or equivalent piece rate) at least equal to a specified amount in each state, which the Secretary determined by taking the lower of the statewide average or the nationwide average for hourly agricultural wages. Since the statewide average in California exceeded the nationwide average,[20] the latter average became the applicable standard in California.[21]

This standard was a concession to the growers, since both averages -- especially the statewide average in states bordering on Mexico -- are substantially affected by the presence of braceros on the labor market.[22] Theoretically, the Secretary should have ascertained what the domestic wage level would be if braceros were not on the market and then required that braceros be paid at that rate. This requirement, coupled with the requirement

18/cont'd.
might also be noted that attempts were made in 1960 and in 1961 to amend the agricultural exemption in the Fair Labor Standards Act so as to deny the Secretary authority under the Wagner-Peyser Act to fix minimum wages. These attempts failed. See note 26 infra.

19/ See text at note 11 supra.

20/ See testimony of Assistant Secretary of Labor Holleman, Hearings on H.R. 2010 before Subcommittee on Equipment, Supplies, and Manpower, House Committee on Agriculture, 87th Cong., 1st Sess., at p. 329, in which Mr. Holleman suggested the alternative standard of the nationwide average to deal specifically with the fact that agricultural wages in California are "rather high".

21/ The nationwide average hourly farm wage in 1961, without room or board, as reported by the Statistical Reporting Service of the United States Department of Agriculture in Farm Labor (January, 1962 issue), was $.99.

22/ Statistics on the number of foreign workers as a percentage of total seasonal employment in agriculture for 1960 are reported in the Hearings at p. 209. Nationally the figure was about 20 per cent. In California the figure was about 30 per cent.

in Section 503(3) that no braceros be hired until reasonable efforts have been made to attract domestic workers at the wages offered the braceros, would have afforded domestic workers complete protection from the adverse effect proscribed by Section 503(2). However, lacking any reasonable method of ascertaining exactly what domestic agricultural wages would be in the absence of braceros, the Secretary took for his standard existing state and national averages. Thus, if the Secretary committed any error, it was an error in favor of the growers resulting from the fact that the state and nationwide averages are themselves affected by employment of braceros.

From the foregoing, it is clear that the Secretary's action was not only well within the authority granted him by Section 503(2), but was indeed essential to effectuate the basic congressional intent, expressed in that Section, to protect domestic wages. Thus the case is similar to American Trucking Ass'ns v. United States, 344 U.S. 298, in which comprehensive I.C.C. regulation of motor carrier leasing practices was upheld, despite the absence of specific statutory reference to leasing practices, on the ground that the practices sought to be corrected by the regulations were subverting the regulatory scheme of the Motor Carrier Act. In the instant case Section 503(2) provides much more specific authority than was present in American Trucking, and the evil of depressed domestic farm wages is just as basic to the congressional intent as was the evil of trip-leasing practices at which the reg-

ulations in American Trucking were aimed.

The general principles of statutory construction expounded by appellants (App. Br. 28-31) are unexceptionable. We agree that the power of an administrative official is limited by the statute delegating the power, that an administrative official may not enlarge his statutory powers merely by issuing regulations, and that courts must construe statutes in accordance with the legislative intent and the plain meaning of unambiguous language.

We do not, however, agree with appellants in reading Section 503 to require the Secretary to permit employment of braceros at the prevailing domestic rate when such rate has itself been adversely affected by the growers' knowledge that braceros will be made available if domestic workers do not take the jobs. It must be remembered that domestic workers, under Section 503(3), need only be offered wages comparable to those offered the braceros. All the growers need do under Section 503(3) is to offer domestic workers a rate sufficient to attract braceros if domestic workers do not respond. It is no wonder that in many areas braceros dominate the farm labor force.[23/] To tie the

23/ Hearings, p. 230.

Secretary's "adverse effect" determination to a wage rate which itself has been adversely affected by the presence of braceros on the market is required neither by the plain meaning of Section 503 nor by the congressional intent expressed therein.[24/]

Appellants argue (App. Br. 32) that the plain language of Section 503(2) requires acceptance of their interpretation, however irrational the results, on the ground that the reference in the Section to "the wages and working conditions of domestic agricultural workers similarly employed" must be construed to refer to the domestic wage prevailing at the time of the Secretary's certification in the area where the Mexicans are to be employed. But even if appellants are correct that this reference must be so construed, it is necessary to read the words as part of the sentence in which they occur. The statute says that the "wages . . . of domestic agricultural workers similarly employed" are

24/ At one point, appellants seem to say that the Secretary may "determine whether adverse effect will result" but may not "fix and enforce a wage which will enable him to determine whether adverse effect will result." (App. Br. 33). The implication is that an administrative official may not announce in advance the criteria that will be used in taking specific administrative action, even though the action itself could validly be taken on the basis of such criteria. This implication is plainly contrary to law. National Broadcasting Co. v. United States, 319 U.S. 190 (FCC has authority to regulate network broadcasting by advance announcement of criteria to be used in granting or renewing station licenses). Appellants do not question the Secretary's authority to "fix and determine" the prevailing wage as the "wage which will enable him to determine whether adverse effect will result."

not to be adversely affected. The statute does not say that the Secretary's certification may be conditioned only upon payment to the braceros of the "wages . . . of domestic agricultural workers similarly employed." And indeed, if such domestic wages have been themselves adversely affected by the growers' knowledge that braceros will be available at the depressed domestic rate, then the Secretary would be allowing an adverse effect, and thus failing to carry out what the statute does say, by making the braceros available at the depressed domestic rate.

Appellants also argue (App. Br. 37-39) that Section 503(2) cannot be construed to permit the Secretary to condition his adverse effect certifications on payment of a given level of wages, for the reasor that this construction would repeal by implication the exemption in the Fair Labor Standards Act of 1938 for "any employee employed in agriculture." 52 Stat. 1067, as amended, 29 U.S.C. 213(a)(6). This argument overlooks the fact that Section 503(2) does not give the Secretary a roving license to fix minimum wages, even on the farms on which braceros are employed.[25/] Section 503(2) merely gives the Secretary

25/ The Secretary's determinations only affect farms on which braceros are employed. These farms comprise less than 2% of the total number of farms in the nation. See 107 Cong. Rec. 7720 (May 10, 1961)(reprinting Department of Labor figures for 1959). Thus the overwhelming majority of the farms covered by the agricultural exemption to the Fair Labor Standards Act remain unaffected. It has been pointed out that 52% of American farms use no hired labor of any kind. 107 Cong. Rec. 18900 (September 11, 1961). This point, however, does not alter the fact that the determinations do not substantially affect the agricultural exemption in the Fair Labor Standards Act. It simply means that about 4% of the farms actually using hired

the authority to combat a specific problem that worried Congress -- the adverse effect of braceros on domestic farm wages. This authority can hardly be said to be inconsistent with the general agricultural exemption contained in an earlier statute dealing with a different problem.[26/]

Finally, appellants argue (App. Br. 36-37) that Section 501(5) gives them an unfettered right to negotiate a wage with Mexican workers hired under the Act, subject only to the limitation that it be no less than the prevailing wage. Section 501 provides in pertinent part as follows:

> the Secretary of Labor is authorized --
>
> * * * * *
>
> (5) to assist such workers and employers in negotiating contracts for agricultural employment (such workers being free to accept or decline agricultural employment with any eligible employer and to choose the type of agricultural employment they desire, and eligible employers being free to offer agricultural employment to any workers of their choice not under contract to other employers).

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agricultural labor are presently affected by the determinations -- hardly the sweeping repeal of the agricultural exemption that appellants attempt to portray.

26/ It is interesting to note that in 1960 and 1961 attempts were made to amend the Fair Labor Standards Act to provide that, "Except as may otherwise be expressly provided by law, the Secretary of Labor shall have no power to regulate, either through the withholding of benefits or services or otherwise, the wages of employees employed in agriculture." Both attempts failed. See 106 Cong. Rec. 16500-16521 (August 16, 1960); 107 Cong. Rec. 6256-6259 (April 19, 1961).

All this Section says is that the Secretary shall assist in negotiating the employment contracts, and that the workers are free to choose their employment and the employers are free to choose their workers. If appellants read the Section as prohibiting any limitation on the employment contract not mentioned in the Section, then consistency would require appellants to argue that Article 15 of the Migrant Labor Agreement violates Section 501 by requiring employers to pay the prevailing wage or a wage sufficient to cover the Mexican's normal living needs, and that Article 11 of the Migrant Labor Agreement (R. 81) violates Section 501 by requiring employers to incorporate the Standard Work Contract into their employment contracts.[27/] Plainly, appellants are reading too much into Section 501(5), which is simply part of a Section delineating the Secretary's function of recruiting Mexican workers and transporting them to the areas where they are needed and has nothing to do with what measures may be taken to protect domestic workers.

The question here presented as to the Secretary's authority has not been adjudicated prior to this action. In Johnson v. Kirkland, 290 F. 2d 440 (C.A. 5), certiorari denied, 368 U.S. 889, the action was dismissed for failure to join an indispensable party. The language which appell-

27/ Limitations in the Standard Work Contract have been specifically approved in some of the legislative history relied on by appellants as authoritative. See App. Br. 47, referring to Article 10 of the Standard Work Contract (R. 100).

ants quote from the opinion (App. Br. 35) is simply a summary of the plaintiff's argument, which the court found to be "substantial" but to be "offset" by the "powerful arguments" of the Secretary. Id. at 445. The court expressly refused to rule on the merits and did not come to any conclusion either for or against appellants' contentions herein.[28/]

In short, we submit that the Secretary's action was not only authorized by Section 503(2), but indeed was required by the congressional mandate to prevent the employment of Mexican workers from adversely affecting domestic wage rates. Accordingly, if this Court deems it proper to adjudicate the question in this case, we submit that the conclusion reached by the court below must be upheld.

28/ Dona Ana County Farm and Livestock Bureau v. Goldberg, 200 F. Supp. 210 (D.D.C.), is also cited by appellants (App. Br. 35). However, if the whole case is read rather than isolated language, it will be seen to lend support to the Secretary's position, although it is by no means conclusive. There the Secretary, in an action presaging the determinations here challenged, had attacked the problem posed by the fact that prevailing domestic wage rates in the New Mexico counties where braceros were employed were substantially lower than rates for the same type of labor in the counties where braceros were not employed. The action taken was to change the criteria used in measuring the prevailing domestic rate, which was the rate at which "adverse effect" determinations were being issued under the then current administrative practice. The principal change was to include the wages of domestic workers employed on a year-round basis, although it might seem that such workers are not "similarly employed" within the meaning of Section 503(2) (Mexicans are generally employed only on a seasonal basis). The court held for the Secretary, but the opinion does not make it clear whether the basis for the holding is (1) that the method of survey was not an arbitrary method of determining the prevailing wage of domestic workers "similarly employed", or (2) that the Secretary has power to condition his adverse effect determination upon some wage level other than the prevailing rate if he believes that employment of

III. The authority delegated by Congress to the Secretary to determine the circumstances in which employment of Mexican workers would adversely affect the wages and working conditions of domestic agricultural workers similarly employed does not constitute an unlawful delegation of legislative power.

Section 503(2) provides that no braceros shall be made available for employment unless the Secretary of Labor determines and certifies that

> the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed.

We have argued that the determinations here challenged are an attempt to carry out the congressional direction contained in Section 503(2) and are accordingly within the authority granted by that Section. If this argument is correct, the Secretary's discretion under Section 503(2) is confined to the taking of action for the purpose of preventing the adverse effect proscribed by the statute. We do not suggest that the Secretary has a roving license to fix a minimum wage at any level he may desire. The statute lays down a standard--adverse effect--which is considerably more definite than the standards which were held to be sufficient delimitations of delegated authority in Opp Cotton Mills v. Administrator, 312 U.S. 126, the case relied on by appellants (App. Br. 58-59).

28/cont'd.
Mexicans has adversely affected the prevailing rate. The first ground mentioned would support neither appellants' nor the Secretary's positon herein; the second ground directly supports the Secretary's position.

Indeed, on other occasions Congress has seen fit to give administrative officials authority to fix minimum wages, subject only to standards much broader than the "adverse effect" standard of Section 503(2). See 29 U.S.C. 206 (giving Secretary of Labor authority to fix certain minimum wages in Puerto Rico and the Virgin Islands); 7 U.S.C. 1131(c)(1) (giving Secretary of Agriculture authority to condition payments under the Sugar Act upon payment of wages which he finds to be "fair and reasonable"). Appellants would presumably regard these statutes, as well as many others containing similarly broad delegations, as unconstitutional. Appellants' argument goes too far, and has no support in reason or authority.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and the case remanded with directions to dismiss for lack of jurisdiction. In the alternative, it is submitted that the judgment below should be affirmed.

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DECEMBER, 1963

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

_____
Attorney